

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CORBIS CORPORATION, a Nevada
corporation,

Plaintiff,

v.

INFINITY COMMERCIAL CAPITAL LLC,
a Georgia corporation,

Defendant.

INFINITY COMMERCIAL CAPITAL LLC,
a Georgia corporation,

Third-Party Plaintiff,

v.

LENOX MEDIA LLC, a dissolved Georgia
corporation; ROBERT "ADAM" WISWELL
and JANE DOE WISWELL, husband and
wife,

Third-Party Defendants.

CASE NO. 2:09-CV-00657-TSZ

ANSWER TO COMPLAINT FOR
DAMAGES AND INJUNCTIVE RELIEF
AND THIRD-PARTY COMPLAINT

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-
4711 | www.tewellfirm.com

1 Comes now INFINITY COMMERCIAL CAPITAL L.L.C., by and through its counsel of
2 record DAVID TEWELL of THE TEWELL FIRM hereby answers Plaintiff's Complaint for
3 Damages and Injunctive Relief, and brings its third-party complaint against LENOX MEDIA
4 L.L.C. and ROBERT "ADAM" WISWELL:
5

6 **I. PARTIES**

- 7
- 8 1. Answering Defendant is without sufficient information to admit or deny said
9 allegation, and thus denies the same.
 - 10 2. Denied. Answering Defendant is a Georgia Limited Liability Company with its
11 principal place of business at 3150 Hwy 34 East, Suite 141, Newnan, Georgia
12 30265
13

14 **II. JURISDICTION AND VENUE**

- 15
- 16 3. Admitted.
 - 17 4. Answering Defendant lacks information sufficient to form a belief as to the
18 allegations contained in paragraph 4 and therefore denies the same.
 - 19 5. Denied.
20

21 **III. BACKGROUND**

- 22
- 23 6. Answering Defendant lacks information sufficient to form a belief as to the
24 allegations contained in paragraph 6 and therefore denies the same.
 - 25 7. Answering Defendant lacks information sufficient to form a belief as to the
26 allegations contained in paragraph 7 and therefore denies the same.
27

28 **THE TEWELL FIRM**

29 600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-
30 4711 | www.tewellfirm.com

1 8. Answering Defendant lacks information sufficient to form a belief as to the
2 allegations contained in paragraph 8 and therefore denies the same.

3
4 9. Answering Defendant admits Infinity Commercial Capital is in the business of
5 providing hotel and commercial mortgage lending services. Defendant denies it
6 provides hotel and commercial mortgage lending services nationwide. Answering
7 Defendant admits it owned a website located at the Internet domain address
8 www.infinitycommercialcapital.com. Answer Defendant admits it uses the
9 website www.infinitycommercialcapital.com to market its products and services.
10 Answering Defendant lacks information sufficient to form a belief as to the
11 allegations contained in the remainder of paragraph 9 and therefore denies the
12 same.
13
14

15
16 10. Answering Defendant lacks information sufficient to form a belief as to the
17 allegations contained in paragraph 10 and therefore denies the same.

18
19 11. Answering Defendant lacks information sufficient to form a belief as to the
20 allegations contained in paragraph 11 and therefore denies the same.

21
22 12. Answering Defendant lacks information sufficient to form a belief as to the
23 allegations contained in paragraph 12 and therefore denies the same.

24
25 13. Answering Defendant admits there are attached as Exhibit 1 images. Answering
26 Defendant lacks information sufficient to form a belief as to the allegations
27 contained in the remainder of paragraph 13 and therefore denies the same.
28
29
30

1 14. Answering Defendant lacks information sufficient to form a belief as to the
2 allegations contained in paragraph 14 and therefore denies the same.

3
4 15. Answering Defendant lacks information sufficient to form a belief as to the
5 allegations contained in paragraph 15 and therefore denies the same.

6 16. Denied.

7
8 **IV. FIRST CAUSE OF ACTION – DIRECT COPYRIGHT INFRINGEMENT**

9 17. Denied, except as noted.

10 18. Denied.

11 19. Denied.

12 20. Denied.

13 21. Denied.

14 22. Denied.

15
16
17 **V. SECOND CAUSE OF ACTION – VICARIOUS COPYRIGHT INFRINGEMENT**

18 23. Denied, except as noted.

19 24. Answering Defendant admits it hired an independent contractor to create
20 www.infinitycommercialcapital.com. Answering Defendant lacks information
21 sufficient to form a belief as to the allegations contained in the remainder of
22 paragraph 24 and therefore denies the same.

23
24
25 25. Answering Defendant lacks information sufficient to form a belief as to the
26 allegations contained in paragraph 25 and therefore denies the same.

27 26. Denied.

1 27. Answering Defendant lacks information sufficient to form a belief as to the
2 allegations contained in paragraph 27 and therefore denies the same.

3
4 28. Denied.

5 **VI. THIRD CAUSE OF ACTION – BREACH OF CONTRACT**

6 29. Denied, except as noted.

7
8 30. Denied.

9 31. Denied.

10 32. Denied.

11 33. Denied.
12

13 **VII. AFFIRMATIVE DEFENSES**

14
15 By way of further Answer, and as affirmative defenses to the Complaint, Answering Defendant
16 alleges as follows:

- 17
- 18 1. Plaintiff's Complaint, in whole or in part, fails to state a claim upon which relief
19 can be granted.
 - 20 2. The court lacks personal jurisdiction over Defendant. Defendant does not have
21 sufficient contacts with Washington to be subject to personal jurisdiction in this
22 action.
 - 23 3. Venue in this court and district is improper.
 - 24 4. Plaintiff has failed to join a necessary party to this action.
25
26
27
28
29
30

- 1 5. The Plaintiff's injuries or loss, if any, were caused in whole or in part by the
2 negligence or fault of persons other than Answering Defendant, and over whom
3 Answering Defendant had no control, including Plaintiff, Third-Party Defendant
4 Adam Wiswell and/or Lenox Media, LLC, other defendants, and other entities not
5 named as parties herein.
6
- 7 6. Pursuant to the doctrine of apportionment, Defendant is liable, if at all, only for its
8 proportionate share of Plaintiff's damages, after considering the total fault
9 attributable to all entities that caused Plaintiff's damages, including Plaintiff, the
10 other defendants, and other entities not parties to this action; and Answering
11 Defendant is entitled to contribution from all other defendants based on
12 comparative fault.
13
- 14 7. Answering Defendant is not liable, if at all, jointly and severally for the damages
15 caused by the intentional or negligent acts of others.
16
- 17 8. Plaintiff's claims are barred to the extent that it does not own valid copyrights in
18 the images at issue.
19
- 20 9. Plaintiff's claims are barred to the extent that it does not hold valid copyright
21 registrations in the images at issue. Plaintiff has failed to satisfy the requirement
22 of 17 U.S.C. §411(a) for at least some of the images that "no action for
23 infringement in the copyright in any United States work shall be instituted until
24 registration of the copyright claim has been made in accordance with this title."
25
26
27
28
29
30

10. Plaintiff is not entitled to statutory damages or attorneys' fees under 17 U.S.C. §412(2) to the extent Plaintiff did not register its claims of copyright prior to Defendant's alleged infringements or within three months after first publication.
11. Plaintiff's claims are barred in whole or in part by license.
12. Plaintiff's claims are barred in whole or in part by estoppel.
13. Plaintiff's claims are barred in whole or in part by waiver.
14. Plaintiff is barred from obtaining the relief requested under the doctrine of unclean hands.
15. Plaintiff has suffered no damages and/or has failed to mitigate its damages, if any.
16. At all times, Defendant acted in a commercially reasonable and lawful manner.
17. Plaintiff failed to protect and/or enforce its alleged rights.
18. Plaintiff has engaged in misuse of its copyrights.
19. Plaintiff engaged in fraud on the Copyright Office.
20. Plaintiff's claims are barred by the first sale doctrine.
21. Plaintiff's claims are barred, in whole or in part, by prior use and/or registration.
22. If Defendant should be found to have engaged in any infringing action, which action Defendant denies, Defendant's actions, in the alternative, constituted and were innocent infringement as Defendant was unaware of the infringing activity and/or had a belief reasonably held that its actions were in accordance with the law and existing agreements or understandings.

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-4711 | www.tewellfirm.com

23. Actual damages, if any, should be based on actual license fees.

24. Plaintiff's damages were proximately caused by intervening or superceding causes.

25. Answering Defendant incorporates herein by reference any affirmative defense of any other defendant, to the extent that such affirmative defense is not adverse to any interest of Answering Defendant.

26. All possible affirmative defenses may not have been alleged herein, insofar as sufficient facts were not available after reasonable inquiry upon the filing of Defendant's Answer and therefore, Defendants reserve the right to amend their Answer to allege additional affirmative defenses if subsequent investigation warrants.

VIII. PRAYER FOR RELIEF

WHEREFORE, Answering Defendant having fully answered the plaintiff's Complaint, prays as follows:

1. Enter judgment in Answering Defendant's favor, dismissing Plaintiff's claims with prejudice;
2. Award Answering Defendant its reasonable costs and attorneys fees as permitted by law; and
3. Award any other, supplemental, or exemplary damages as the Court deems just and appropriate.

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-4711 | www.tewellfirm.com

THIRD-PARTY COMPLAINT

COMES NOW INFINITY COMMERCIAL CAPITAL, herein Third-Party Plaintiff, and brings this Third-Party Complaint against LENOX MEDIA L.L.C. and ADAM WISWELL, and without admitting any matters previously denied, alleges as follows:

I. PARTIES

- 1.1 Infinity Commercial Capital ("Infinity") is a licensed business in the State of Georgia with its principle place of business at 3150 Hwy 34 East, Suite 141, Newnan, GA 30265.
- 1.2 Upon information and belief, Third-Party Defendant Robert "Adam" Wiswell resides in Evans, Georgia.
- 1.3 Upon information and belief, Third-Party Defendant Lenox Media, L.L.C. ("Lenox") was a Domestic Limited Liability Company registered with the State of Georgia from September 19, 2006 until it was administratively dissolved May 16, 2008. Lenox Media L.L.C.'s principal office was 2095 Sonoma Pointe Drive, Columbus, Georgia 31909. Wiswell served as Lenox's Registered Agent, Organizer, and Member/Manager.

II. JURISDICTION AND VENUE

- 2.1 This is a civil action seeking damages for breach of contract and breach of warranties.
- 2.2 If this Court determines it has personal jurisdiction over Infinity, this Court has jurisdiction over this Third-Party Complaint under 28 U.S.C. §1367 because the

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-4711 | www.tewellfirm.com

claims are related to Plaintiff's claims under this Court's original jurisdiction and form part of the same case or controversy under Article III of the U.S. Constitution.

2.3 If this Court determines it has personal jurisdiction over Infinity, this Court has personal jurisdiction over the Third-Party Defendants under RCW 4.28.185.

2.4 If this Court determines the Western District of Washington is the proper venue for Plaintiff's claims of copyright infringement and breach of contract, venue is appropriate for the Third-Party Complaint pursuant to 28 U.S.C. §1391.

III. BACKGROUND

3.1 Plaintiff Corbis Corporation has brought the above-captioned lawsuit against Infinity. Without admitting any of the allegations against it contained in Plaintiff's Complaint, Infinity refers to the allegations of Plaintiff's lawsuit as if stated herein, for the sole purpose of presenting the factual allegations Plaintiff has made. Infinity refers to its Answer, presented above herein, to demonstrate the admissions, denials, and other allegations made by Infinity in response to Plaintiff's Complaint.

3.2 Infinity is in the business of providing hotel, multi-family, and other commercial mortgage lending services.

3.3 Infinity has never designed a website, and is not and never has been in the business of website design.

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-
4711 | www.tewellfirm.com

- 1 3.4 Infinity has at all material times maintained a webpage at
2 www.Infinitycommercialcapital.com. Neither Infinity employees nor agents
3 constructed the website.
4
- 5 3.5 Upon information and belief, Lenox is a professional website design company
6 that regularly dealt in the creation and sale of websites.
7
- 8 3.6 Upon information and belief, Wiswell is a professional web designer who
9 regularly dealt in the creation and sale of websites.
- 10 3.7 Upon information and belief, Wiswell served as Lenox's Registered Agent,
11 Organizer, and Member/Manager.
12
- 13 3.8 Infinity Commercial Capital entered into an oral agreement with Lenox and/or
14 Wiswell to design and maintain Infinity's website.
15
- 16 3.9 Lenox and/or Wiswell implicitly disclaimed any agency, partnership, joint
17 venture or any other form of joint enterprise between Infinity and Lenox and/or
18 Wiswell.
19
- 20 3.10 At all times relevant to this lawsuit, Lenox and/or Wiswell were independent
21 contractors of Infinity for the purposes of web design. Neither Lenox, nor
22 Wiswell, was under the direct control or supervision of Infinity regarding the
23 web design.
24
- 25 3.11 For federal income tax purposes, Wiswell filed IRS Form 1099-MISC in 2008
26 for income received from Infinity for his web design services.
27
28
29
30

1 3.12 At all relevant times, Lenox and/or Wiswell controlled all access to the content
2 on Infinity's website.

3 3.13 All acts and decisions regarding the procurement of images placed on the website
4 were carried out by Lenox and/or Wiswell.

5 3.14 Lenox and/or Wiswell, without the input or assistance from Infinity, selected and
6 uploaded the images that allegedly infringe Corbis' copyrights.

7 3.15 Lenox and/or Wiswell represented through conduct that they owned all of the
8 rights in the work produced for Infinity's website.

9 3.16 On August 5, 2009, Infinity was served with a Summons and Complaint from
10 Corbis Corporation listing direct copyright infringement, vicarious copyright
11 infringement, and breach of contract related to the alleged copyright
12 infringement. All causes of action listed in the Complaint relate to the digital
13 images placed on the web pages created by Lenox and/or Wiswell for Infinity.

14 3.17 To the extent that any of the images on Infinity's website infringed Corbis'
15 copyright, Lenox and/or Wiswell intentionally or negligently failed to obtain a
16 license or other authorization from Corbis to copy, distribute, or publicly display
17 such images.

18 3.18 To the extent that any of the images on Infinity's website infringed Corbis'
19 copyright, Lenox and/or Wiswell intentionally or negligently uploaded images on
20 Infinity's website knowing they failed to obtain a license from Corbis or other
21 authority to publish and distribute the images.

22
23
24
25
26
27
28
29
30
THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-
4711 | www.tewellfirm.com

3.19 To the extent it is determined that any of the images on Infinity's website were accessed under any contract with Corbis, such as a Content License Agreement, Lenox and/or Wiswell, and not Infinity, agreed to such a contract.

3.20 If Plaintiff sustained any damages, it was solely and proximately caused by the acts or failures of Lenox and/or Wiswell.

3.21 All acts and failures to act were on behalf of Lenox and/or Wiswell and Wiswell's marital community, if any.

IV. FIRST CAUSE OF ACTION: BREACH OF CONTRACT

4.1 Infinity repeats and realleges the allegations set forth above and incorporates the same by reference as if fully restated.

4.2 Infinity and Lenox and/or Wiswell entered into an oral contract for the creation and maintenance of Infinity's website.

4.3 Integrity paid a fair price to Lenox and/or Wiswell in exchange for the delivery of the website.

4.4 Lenox and/or Wiswell implicitly agreed to and had a duty to obtain licenses for third-party proprietary content provided to Infinity on the website, to act legally in the creation and maintenance of Infinity's website, and not subject Infinity to a lawsuit or other claim based on the images located on Infinity's website.

4.5 To the extent that any images used on Infinity's website were proprietary to and used without authorization of Corbis, Lenox and/or Wiswell breached the oral agreement with Infinity when they intentionally or negligently failed to obtain

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-4711 | www.tewellfirm.com

licenses for use of third party content on the web pages it developed for Infinity violating federal copyright law and subjecting Infinity to this lawsuit.

4.6 As a result of the actions and conduct described above, Lenox and/or Wiswell are liable for breach of contract in an amount to be proven at trial.

V. SECOND CAUSE OF ACTION – BREACH OF WARRANTY OF TITLE

5.1 Infinity repeats and realleges the allegations set forth above and incorporates the same by reference as if fully restated.

5.2 Infinity paid a fair price to Lenox and/or Wiswell in exchange for delivery of the website.

5.3 Upon information and belief, Lenox and/or Wiswell are professional website designers that regularly deal in the creation and sale of internet websites. Lenox and/or Wiswell are merchants regularly dealing in goods of the kind, websites.

5.4 By delivering the website, Lenox and/or Wiswell warranted that the title conveyed shall be good, and its transfer rightful; and that the website was delivered free from any security interest or other lien or encumbrance of which Infinity at the time of contracting had no knowledge.

5.5 By delivering the website, Lenox and/or Wiswell warranted that the website would be delivered free of the rightful claim of any third person by way of infringement or the like.

5.6 There was no specific language in a contract or circumstances which give Infinity reason to know that Lenox and/or Wiswell did not claim title to the website

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-4711 | www.tewellfirm.com

images or purported to sell only such right or title as or a third person had in the website images.

5.7 To the extent that any images used on Infinity's website were proprietary to Corbis, such proprietary interest was an encumbrance on the transfer of title to the website images.

5.8 To the extent that any images used on Infinity's website were proprietary to Corbis, Infinity had no knowledge of Corbis' interest therein, and therefore had no knowledge that the web pages were encumbered.

5.9 To the extent that any images used on Infinity's website were proprietary to Corbis, Lenox and/or Wiswell breached the warranty of title by delivering the website images to Infinity while the images were encumbered by Corbis' proprietary interest in such images.

6.0 As a result of the actions and conduct described above, Lenox and/or Wiswell are liable for breach of warranty of title in an amount to be proven at trial.

VI. INDEMNIFICATION AND CONTRIBUTION

6.1 Infinity repeats and realleges the allegations set forth above and incorporates the same by reference as if fully restated.

6.2 While denying the allegations of Plaintiff's Complaint on file herein, Infinity alleges that in the event that Infinity is found in some manner responsible to Plaintiff, or to anyone else, as a result of the conduct, events, and matters

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-4711 | www.tewellfirm.com

1 described in Plaintiff's Complaint, Infinity contends that this liability would be
2 based solely upon a derivative form of liability not resulting from the conduct of
3 Infinity, but only from an obligation imposed upon it by law, and would,
4 therefore, be entitled to indemnity from Third-Party Defendants Lenox and/or
5 Wiswell for any and all recovery obtained by Plaintiff against Infinity.
6

7
8 6.3 If judgment should be recovered against Infinity and or if Infinity should enter
9 into a settlement, Infinity will be entitled to judgment, and the like amount in
10 proportion to fault, for equitable indemnity and/or contribution over and against
11 Lenox and/or Wiswell.
12

13 6.4 In addition, Infinity will be entitled to recover from Lenox and/or Wiswell all
14 costs, expenses, and attorney's fees that Infinity incurred in the defense of
15 Plaintiff's Complaint and incurred in the preparation, presentation, and
16 prosecution of this Third-Party Complaint.
17

18 VII. PRAYER FOR RELIEF

19 WHEREFORE, Third-Party Plaintiff prays for the following relief:
20

21 7.1 A determination that Third-Party Defendants Lenox and/or Wiswell's actions
22 breached the contract with Third-Party Plaintiff;
23

24 7.2 A determination that Third-Party Defendants Lenox and/or Wiswell's actions
25 breached the warranty of title;
26

27 7.3. A declaration that Lenox and/or Wiswell are contractually required to fully
28 indemnify and hold Infinity harmless for any and all liabilities, losses, damages,
29
30

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-
4711 | www.tewellfirm.com

costs, claims, fees, charges, suits, actions, judgments, and expenses of any kind arising out of the Plaintiff's suit;

7.4 An award to Third-Party Plaintiff of its reasonable costs and attorneys fees as permitted by law; and

7.5 An award to Third-Party Plaintiff of any other, supplemental, or exemplary damages as the Court deems just and appropriate.

DATED this 21st day of September, 2009.

THE TEWELL FIRM

s/ David Tewell

DAVID TEWELL

WSBA #9000

600 Stewart Street, Suite 1100

Seattle, WA 98101

Telephone: 206-623-2369 Fax: 206-441-9711

E-mail: dtewell@tewellfirm.com

Attorney for Infinity Commercial Capital

1497-01/pleadings/answer

THE TEWELL FIRM

600 Stewart Street
Suite 1100 | Seattle, WA | 98101
Tel: (206) 623-2369 | Fax: (206) 441-4711 | www.tewellfirm.com